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SUMMARY RECORD OF THE 537th MEETING

Held at Headquarters, New York,
on Friday, 10 June 1994, at 3 p.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 3.10 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT GUIDELINES FOR PREPARATORY CONFERENCES IN ARBITRAL PROCEEDINGS (continued) (A/CN.9/396/Add.1)

Chapter III, section B (continued)

1. Mr. GRIFFITH (Observer for Australia) said he felt that the time had come for the Commission to take some basic decisions, such as on whether or not to delete section B. It seemed that a majority of members of the Commission were in favour of deleting it, although some delegations had supported his own delegation's proposal to reword the section heading and redraft the remarks so as to make them more positive. His delegation was prepared to accept either of those two options but believed that, for the purposes of the conference which the International Council for Commercial Arbitration was to hold in November, it should be made clear whether the Commission had reached agreement on deleting the section.

Chapter III, section C

2. Mr. TUVAYANOND (Thailand) said that he was not in favour of deleting section C; it would be sufficient to make slight drafting changes, which could be entrusted to the Commission secretariat. It must be made clear that the function of the arbitral tribunal should not be confused with that of a mediator or a conciliator. However, the arbitral tribunal should be aware of the existence of discussions taking place outside the framework of the arbitration and should be informed of the results.

3. Mr. ANDERSEN (Denmark) said that the Commission should take a decision at the current session on the check-list of possible topics for preparatory conferences; there was no justification for convening a working group for that purpose.

4. Section C should remain unchanged. It was difficult to see what connection there was between having the arbitral tribunal inquire whether it was possible for the parties to settle a dispute and attributing to the arbitral tribunal the role of conciliator or mediator. The remarks concerning a possible confusion of functions actually referred to a different topic and should be deleted, or, in any event, included in a separate section. It should be borne in mind that not all countries had the same legal traditions or the same number of lawyers. Arbitral proceedings were costly and the parties might wish to avoid them in so far as possible.

5. Mr. BONELL (Italy) said that section C, paragraphs 1 and 2, should be substantially amended or deleted. In particular, the second sentence of paragraph 1 and all of paragraph 2 should be deleted. He disagreed with the representative of Denmark, since in Italy a clear distinction was made between the function of an arbitrator and that of a conciliator or mediator. It was not desirable to confuse the two functions. The situation was different from that in which a court was asked to monitor the implementation of an agreement between

the parties, because in the current case the court would be operating parallel to the arbitration and to the conciliation or mediation.

6. Mr. SHIMIZU (Japan) said that he was opposed to deleting paragraphs 1 and 2 which, like the rest of the Guidelines, contained useful information for the lawyers who would be involved in arbitral proceedings and must be informed of the existence of divergent views on that question. However, those paragraphs could be moved to a different place.

7. Mr. ANDERSEN (Denmark) said that in Denmark, too, a distinction was drawn between the function of arbitration and that of conciliation and mediation. However, just as the courts tried to bring about a settlement between the parties at the first hearing, an arbitration tribunal, after reading all the documents submitted by the parties, could inquire whether they wished to seek a settlement. That procedure could be useful, especially when one of the parties was a government institution which would otherwise have more difficulty in reaching a settlement.

8. Mr. HOLTZMANN (United States of America) said that the fact that paragraphs 1 and 2 were in brackets meant that the purpose of the Guidelines could be fulfilled without them. The question had been considered by the International Arbitration Committee, a group of consultants belonging to the American Arbitration Association, which had decided that paragraphs 1 and 2 should be deleted because, among other reasons, they were not germane to the topic.

9. The drafting group should also be requested to change the title of section C. The preparatory conference should only determine whether any situations existed which might affect the scheduling of the arbitral proceedings, such as the fact that the parties were prepared to reach a settlement or the likelihood that discussions would be held for that purpose. The preparatory conference should not take up the terms of a possible settlement or initiate a conciliation process unless the parties requested it. Yet the title of section C, "Possibility of settlement", suggested intervention by the arbitral tribunal.

10. The reason for not including paragraphs 1 and 2 was that there were very different opinions as to whether it was appropriate for an arbitrator also to act as a conciliator. Practice also varied widely in different parts of the world, and even within different branches of commercial activity in the same country, as in the case of the United States of America. Norms and practice in respect of the function of tribunals also varied in some countries, as the representative of Denmark had pointed out. It might be worth taking into account the ethical standards established some years previously by the American Arbitration Association and the American Bar Association, which held that, while arbitrators should not in principle act as conciliators, they were ethically qualified to do so if both parties requested them to assume that function. That was quite different from coming forward and offering those services.

11. Mr. LEVY (Canada) said that, although he was not opposed to the establishment of working groups when they could carry out a useful function, he felt that if that was done after the Commission itself had expressed its views on the various items, the working group's deliberations would be too restricted.

12. Mr. ZHANG Qikun (China) said that section C should be retained and its application should be left to the discretion of arbitrators in individual countries, since different countries had different judicial systems. In China, the function of arbitrator was combined with that of conciliator, and experience in that area had been satisfactory. In arbitral proceedings the parties were asked whether they wished to attempt conciliation, and if they agreed, the arbitrator could act as a conciliator. If no solution was reached after that, the same arbitrator who had acted as conciliator could resume the role of arbitrator. In his view, it was appropriate for the arbitrators to perform the role of conciliators and not to invite third parties to intervene, since that would also increase the costs. Conciliation offered many advantages, including speed.

13. Mr. TUVAYANOND (Thailand) said that he was in favour of retaining section C, which was useful to avoid the high costs of arbitral proceedings. It was not necessary to go into too much detail; it was sufficient for the arbitral tribunal to ask the parties whether they had held discussions with a view to reaching a settlement and what the result had been.

14. The CHAIRMAN said that the discussion seemed to indicate that section C should be retained; that the drafting of paragraph 1 should be improved while paragraph 2, in brackets, could be deleted; and that there were no problems with paragraph 3.

15. Mr. BURMAN (United States of America) said that at the current meeting there had not been a majority in favour of maintaining section C; at least half the speakers had wanted to delete it. Moreover, his delegation had suggested that, if anything was retained from that section, the title should be changed to give the subject a different focus.

Chapter III, section D, paragraph (i)

16. The CHAIRMAN said that item (i) was one of the most sensitive and important topics on the list, since it was concerned with how to define the points at issue, the possibility of excluding some of them and concentrating on others, and the order in which the issues should be decided.

17. Mr. TUVAYANOND (Thailand) said that in the title of item (i) it would be more appropriate to use the word "identify" than the word "define", in line with paragraph 1 of the remarks. There would be no difficulty in keeping the word "define" in item (ii).

18. The CHAIRMAN said that, considering the stage in the proceedings at which the question arose, it was perhaps more appropriate to use the word "define", as in the document, rather than the word "identify".

19. Mr. HOLTZMANN (United States of America) proposed deleting the final sentence of paragraph 1. He was particularly concerned by the wording "if, however, the facts are largely undisputed and the issues concern law, it might be possible [for the arbitral tribunal] to request that the proceedings be conducted on the basis of documents only". In the early stage of the proceedings, during the preparatory conference - before statements of claim and

defence and, for example, before briefs - it would be impossible for the tribunal to know which facts were largely undisputed or whether the points at issue concerning law were more important than the facts in dispute.

20. Moreover, it would not be proper for an arbitral tribunal to request that hearings should be conducted solely on the basis of documents in cases where the issues were predominantly legal, since arguments on legal issues could be extremely important. The Commission should not support the idea that arguments on legal issues should be handled through written submissions, taking into account, in particular, article 15, paragraph 2, of the Arbitration Rules, which stated: "If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral arguments". It was no accident that the phrase "oral arguments" was included, for 20 years earlier, during the debate on the UNCITRAL Rules, the point had been made that either party ought to be able to request oral argument, which meant oral argument on a legal point, and not only presentation of evidence.

21. Mr. LEVY (Canada) supported the United States proposal. Oral argument, even on strict questions of law, sometimes elucidated or brought out points which had not been mentioned in the written arguments of either party, and the courts always found that very useful. Oral arguments also afforded the arbitrators the opportunity to ask questions about aspects which were unclear.

22. Mr. BONELL (Italy) said that, in view of the considerable differences in that area between the common law and Roman law systems, he could accept a rewording of the final sentence of paragraph 1 so that it would read "If, however, the facts are largely undisputed and the issues concern law, it might be possible to request that the proceedings be conducted prevailingly or predominantly on the basis of documents only".

23. Mr. HOLTZMANN (United States of America) said that he felt as if he was reliving the discussion which had taken place 20 years earlier, when the Commission had decided by consensus that there should not be any bias whatsoever against hearings, on issues of either fact or law, in the event that one party chose such a hearing. It should be borne in mind that the Commission had already stated its position in that regard, both in its Arbitration Rules and in the Model Law. It would therefore have to proceed with extreme caution in introducing drafting changes, and it was not clear that that was ultimately the best solution.

24. Mr. ANDERSEN (Denmark) said he was not sure that the representative of the United States of America was correct in interpreting the provision to mean that the arbitrators were the ones who could request that the proceedings should be conducted on the basis of documents only. Perhaps the parties should be the ones to make that request. In his view, section D was not consistent with the proposal to override article 15 of the Arbitration Rules, which stated that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate". That was the basic rule in any tribunal. If the final sentence of paragraph 1 was interpreted as meaning that the parties could request that the proceedings should be conducted on the basis of documents only, he would not be opposed to retaining it.

25. Mr. BONELL (Italy) suggested stating that, at the request of the parties, the proceedings could be conducted predominantly on the basis of documents.

26. Mr. TUVAYANOND (Thailand) said that item (i) served to define the points at issue between the parties. The reference to the best procedures for resolving the issues, which was a procedural question, was therefore superfluous. And if the current text of paragraph 1 was retained, some sort of safety clause would have to be included to prevent the use of stalling tactics.

27. Mr. SEKOLEC (International Trade Law Branch) said that the provision was aimed at ensuring that the parties focused on the disputed points, without wasting time on methods that were not in dispute or on which agreement could be reached. That was explained in the first two sentences of paragraph 1. The rest of the paragraph was explanatory in nature and, strictly speaking, unnecessary.

28. Mr. ANDERSEN (Denmark) said that the meaning of paragraph 1 would have to be clarified. According to Italy and Denmark, it was the parties that should request that the proceedings should be conducted on the basis of documents only, while the United States construed the text to mean that the arbitral tribunal should ask the parties if they wished the proceedings to be conducted in that manner.

29. Mr. TUVAYANOND (Thailand) said that the arbitral tribunal was supposed to ask the parties whether or not they wished the proceedings to be conducted on the basis of documents only.

30. Mr. SEKOLEC (International Trade Law Branch) said that the parties should be the ones to decide whether a trial should be held or whether the proceedings should be conducted on the basis of documents. Nevertheless, paragraph 1 gave the arbitral tribunal the option of asking the parties if they wished to forgo a trial.

31. Mr. CHOUKRI SBAI (Morocco) said that he was not opposed to the United States proposal to delete the final sentence of paragraph 1. It would, however, be preferable to reword it to indicate that the arbitral tribunal could ask the parties if they wished the proceedings to be conducted on the basis of documents only.

32. Mr. HOLTZMANN (United States of America) said that the Moroccan suggestion could resolve one of the problems which had arisen, as it removed any distinction between issues of fact and issues of law. The current wording of the last sentence of paragraph 1 implied that trials were more necessary in the case of factual issues than of legal issues.

33. However, another problem remained: the fact that the tribunal could ask the parties whether they wished to forego a trial was somewhat prejudicial to them. That could have major consequences if both parties said that they did not wish to hold a trial but the arbitrators wished to interrogate the witnesses or ask questions on issues of law.

The meeting was suspended at 4.35 p.m. and resumed at 5.05 p.m.

Chapter IV, section D, item (ii)

34. Mr. ABASCAL ZAMORA (Mexico) said that paragraphs 6 and 7 should be deleted as they merely offered advice to the parties and bore no relation to the content of the preparatory conference.

35. Mr. BONELL (Italy) said that paragraphs 6 and 7 were superfluous, and risky as well.

36. Mr. CHATURVEDI (India) expressed a preference for retaining the last sentence of paragraph 6.

37. Mr. TUVAYANOND (Thailand) said that paragraph 6 was of some use in that a more specific definition of the relief or remedy sought was necessary.

38. Mr. HOLTZMANN (United States of America) said that whether or not the second sentence of paragraph 6 was applicable depended on when the preparatory conference took place. It would not be applicable if the meeting took place before the presentation of statements of claim and defence. Even if the conference was held at a later stage, it would not be correct to state that the claimant might be uncertain as to the extent of its rights under the applicable law. There was a danger that, under some national legislation, the award could be ultra vires if it exceeded the remedy being sought.

39. Mr. TUVAYANOND (Thailand) said he did not understand how the points at issue could be defined before the statement of claims had been submitted. As to the concept of ultra vires, before knowing what recourse was available, the claimant had to know its rights under the law; paragraph 6 therefore appeared useful.

40. Mr. CHOUKRI SBAI (Morocco) was also in favour of deleting paragraphs 6 and 7. Under Moroccan law, tribunals could rule only on those matters that were brought before them, and it was therefore normal that the statement should specify what the claims were. Allowing the arbitrators to decide what was being sought would contradict a fundamental legal norm. A preparatory conference was the only way for the parties to know what they could do and how they should do it.

41. Mr. TUVAYANOND (Thailand) said that he would not insist on retaining paragraphs 6 and 7, since paragraph 8 was clear.

Chapter III, section D, item (iii)

42. Mr. LEVY (Canada) said that he did not agree at all with the current wording of item (iii). Above all, the first sentence of paragraph 9 touched on a very sensitive issue, in that if the arbitrators expressed an opinion regarding the order in which the issues were to be taken up, the parties might think that they had already formed an opinion on the issue being disputed. For that reason, he wondered whether a sentence warning them of that danger could not be added.

43. Mr. GRIFFITH (Observer for Australia) said that it was inappropriate to refer to the "partial", "interim" or "interlocutory" awards in paragraphs 10 and 11 because those paragraphs dealt solely with determining the order in which the points at issue were to be decided.

44. Mr. ABASCAL ZAMORA (Mexico) said that it was normal in a preparatory conference for the arbitral tribunal to be able to determine the order in which awards should be made. For example, if an arbitral tribunal agreed to follow a certain order and make an award on a question of jurisdiction within a certain period of time, it could run into problems and not have enough time to rule on the main issue.

45. Mr. CHATURVEDI (India) was in favour of retaining paragraph 9, except for the last sentence, which had nothing to do with determining the order in which the points at issue were to be taken up. The first sentence actually had to do with item (i). In fact, a separate paragraph was probably unnecessary since the tribunal would have to decide the order in which the points at issue should be taken up once they had been determined. The problem of paragraphs 10 and 11 was that the award had to be unique and final, while the rest would be partial, interim and interlocutory orders. Accordingly, the idea of limiting the award seemed inadequate.

46. Mr. TUVAYANOND (Thailand) said that regardless of how important it might be to determine the order in which the points at issue were taken up, paragraphs 10 and 11 seemed unnecessary to him; granting the arbitrators the power foreseen in them could even be dangerous.

47. Mr. BONELL (Italy) was in favour of retaining paragraphs 9, 10 and 11, although perhaps with some modifications. He believed that one of the principal objectives of a preparatory conference was to establish the order in which the points at issue should be taken up when they did not all have to be decided together, and to inform the parties of that order, at least to the extent that the tribunal considered appropriate.

48. Mr. HOLTZMANN (United States of America) said that, in his opinion, determining the order in which the points at issue should be taken up was related to whether some issues should be considered preliminary, such as jurisdiction or the applicable law, for example. Indicating the order in which non-preliminary issues should be taken up could suggest that the tribunal would tell the parties how they ought to defend their case. It was incumbent upon the tribunal to show extreme caution and not to influence the judgement of the claimant's attorney. As to the text of paragraphs 10 and 11, it was not enough to instruct or advise the arbitrators what to do if they felt an issue was preliminary. Regarding the disagreement about whether or not there were partial, interim or interlocutory awards, he recalled that paragraph 1 of article 32 of the UNCITRAL Arbitration Rules used the same terminology.

49. Mr. TUVAYANOND (Thailand) said that it was not simply a matter of determining whether one question was preliminary to another, since it could also be useful to establish an order of priority for the other issues, separating the main ones from those that were secondary. If the arbitral tribunal resolved the main issues, the parties might decide not to proceed with those remaining, for

reasons of time or economy. Consequently, the tribunal had to be allowed to determine, in consultation with the parties, the order of priority of the various issues.

Chapter III, section E

50. Mr. HERRMANN (Secretary of the Commission), supported by Mr. BONELL (Italy), recalled that, according to the introduction to the draft Guidelines (para. 39), the list of topics contained in sections A to T was intended to be as complete as possible, in order to cover all the points that an arbitral tribunal could include in the agenda of a preparatory conference. As a preparatory conference did not have to be held at the same stage of the arbitral proceedings (para. 29), and the stage at which it was held would influence the scope of its agenda (para. 30), it could not, generally speaking, be premature to consider certain kinds of questions at a preparatory conference, nor should that lead to a deletion or modification of the content of the draft Guidelines. It would be sufficient to state, with reference to all the topics included in the draft, that the tribunal should determine in each case whether at a given stage in the arbitral proceedings for which the preparatory conference was being held it was inappropriate or impractical to consider a specific topic.

51. Mr. HOLTZMANN (United States of America), supported by Mr. CHATURVEDI (India), said that paragraph 3 of section E should be deleted, inasmuch as it could be viewed as constituting a threat to the parties that the arbitral tribunal might say in the preparatory conference that the refusal without reason by one of them to admit a fact advanced by the other would be taken into account in apportioning the costs of the arbitration. While the tribunal was not precluded from taking the fact into account later on, announcing that beforehand would amount to coercion.

52. As to the suggestion made by the Secretary of the Commission, the considerations the latter had raised could be worded not only in a general way, but also in relation to specific items.

53. Mr. GRIFFITH (Observer for Australia) concurred with the view that paragraph 3 should be deleted or, in any case, revised in such a way as to remind the parties of the arbitral tribunal's authority in respect of the costs of arbitration and to indicate that such authority could be exercised if it was determined that the refusal to admit specific facts had been unreasonable.

The meeting rose at 6.05 p.m.